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General Accounting Office
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Office of the General Counsel

B-248111.2

April 15, 1993

Mr. R. Wallace Stuart
Acting General Counsel
U.S. Information Agency

Dear Mr. Stuart:

On December 1, 1992, the General Counsel of the U.S. Information Agency (USIA) asked us to give further consideration to a portion of our decision B-248111, Sept. 9, 1992. That decision chiefly concerned whether the National Endowment for Democracy Act allows the National Endowment for Democracy (Endowment) to use USIA grant funds for certain purposes. In B-248111, we also stated that USIA, as a grantor, is responsible for ensuring that privately funded Endowment activities comply with the terms of the Act.

The General Counsel expressed some surprise with our position on USIA's oversight responsibility. The General Counsel's letter enclosed a discussion paper presenting another view of USIA's oversight responsibility and a letter from the Endowment's counsel arguing that our position is constitutionally improper. We continue to believe that B-248111 is correct, and offer the following response to the discussion paper and the Endowment Counsel's letter.

The discussion paper asserts that our view of USIA's oversight responsibilities in B-248111 is an overextension of our holding in 64 Comp. Gen. 582. In 64 Comp. Gen. 582 (1985) we stated that "USIA, in its relationship with the Endowment, has essentially the same oversight responsibilities as any other Federal grantor agency." The discussion paper states that other grantors do not oversee privately funded activities of their grantees. Thus, the paper argues that 64 Comp. Gen. 582 does not support our conclusion in B-248111 that it should examine the Endowment's privately funded activities.

We reached our conclusion in B-248111 not by merely extending the holding in 64 Comp. Gen. 582, but rather by analyzing the terms of the National Endowment for Democracy Act. Under section 503 of the Act, USIA grants to the Endowment are subject to certain terms and conditions. 22 U.S.C. § 4412(a)(1988). One such condition is that the Endowment agree to comply with all requirements of the Act.

22 U.S.C. §§ 4412(a) and 4413(a). The plain meaning of these unqualified provisions is that, by accepting grant funds, the Endowment is agreeing to comply with all the Act's requirements. As discussed in B-248111, some of those requirements apply to privately funded Endowment activities. USIA's oversight of these activities is simply a function of its responsibility to ensure that its grantees comply with the terms and conditions of their grants, which in this case include the requirements of the Act.

In this regard B-248111 is fully consistent with, and a logical extension of, 64 Comp. Gen. 582. We said in that case that USIA's responsibility for overseeing the Endowment's use of grant funds includes ensuring that the Endowment complies with relevant statutory restrictions. Id. at 587. Our conclusion should not be viewed as inapplicable to privately financed Endowment activities, where as here, the Endowment is statutorily required to agree to comply with the Act's requirements in order to receive USIA grants.

The discussion paper then asserts that USIA cannot oversee the Endowment's privately funded activities because USIA lacks a contractual nexus with those activities. The paper argues that grants are generally contractual agreements that limit the use of grant funds, and that the contractual relationship between grantors and grantees generally does not extend to nongrant funded activities. The paper then concludes that, to the extent that the Act places requirements on the Endowment's privately funded activities, USIA is not an appropriate oversight agency.

While this general description of grants is essentially correct, we have noted that the National Endowment for Democracy Act creates a unique relationship between USIA and the Endowment. 64 Comp. Gen. at 585. Thus, we view the particular contractual relationship between USIA and the Endowment to be defined by the terms of the Act. As discussed above, the Act requires the Endowment to agree to comply with all terms of the Act in order to receive the annual USIA grant. 22 U.S.C. §§ 4412(a) and 4413(a). In contrast, the requirements and restrictions in other statutes are expressly limited to grant funded activities. E.g., 5 U.S.C. §§ 1501(4) and 1502 (prohibiting partisan political activities by most state and local officials involved in government activities receiving federal grant funds). We view the broader terms of the National Endowment for Democracy Act as a clear indication that Congress intended USIA to oversee privately financed Endowment activities to the extent necessary to ensure that the Endowment complies with the Act.

Finally, the discussion paper argues that USIA's oversight of privately financed Endowment operations may frustrate the Endowment's congressionally sanctioned fund raising efforts. The paper states that it is "at least arguable" that its involvement will be viewed by donors as "interference with their intended largesse." We cannot agree. Presumably, private donors contribute funds to promote the Endowment's purposes and to finance its authorized activities. We fail to see how the USIA's oversight to ensure that the Endowment operates consistently with its purposes and within its authority would inhibit such donors.

The General Counsel of USIA also enclosed a copy of a letter from the Endowment's Counsel that presented the Endowment's objections to our views in B-248111. The Endowment argues that the "unconstitutional conditions" doctrine prohibits the Congress from attempting to limit the Endowment's privately funded activities. The Endowment admits that the Congress may, as a condition of receiving funds, limit the Endowment's use of grant funds for certain activities. However, the Endowment, citing Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759 (1991), argues that grant conditions may not prohibit the Endowment from using private funds for constitutionally protected activities.

We stated in B-248111 that the ban on directly carrying out programs in 22 U.S.C. § 4413(b)(1) extends to privately funded Endowment activities. The Endowment argues that our conclusion would, under the "unconstitutional conditions" doctrine, improperly restrict its first amendment right to free speech. The Endowment states the Act does not compel our conclusion, and that an alternative interpretation would not raise this constitutional issue. The Endowment then refers to the canon of statutory construction that statutes should be interpreted to avoid raising constitutional issues, and concludes that we should reverse our prior decision.

Factually, we do not believe that our application of the Act significantly limits the Endowment's exercise of its first amendment rights.[1] First, the Endowment may express its views and otherwise engage in first amendment activities by publishing the Journal of Democracy and conducting biennial conferences. See, B-248111. In addition, our decision does not affect whether the Endowment may finance "programs" through an affiliate grantee. The Supreme Court has recognized the use of affiliate organizations as an adequate means of allowing federal grantees to exercise their first

[1]Of course, even limits on using grant funds, which the Endowment concedes is permissible, places some restraints on grantees.

amendment rights. E.g., Rust, 111 S. Ct. at 1774-1775; FCC v. League of Women Voters, 468 U.S. 364, 399-401, appeal dismissed, 468 U.S. 1205 (1984).

In regard to the rules of statutory construction, we note that the canon that the Endowment relies on only applies when there are alternative possible statutory interpretations. 111 S. Ct. at 1771. In Rust, the Court pointed out that this canon "is qualified by the proposition that 'avoidance of a difficulty will not be pressed to the point of disingenuous evasion.'" Id. (quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933). The Act, in clear terms (and without distinguishing between the Endowment's grant funds and its private funds), requires the Endowment to agree to comply with all terms of the Act in order to receive annual USIA grants, 22 U.S.C. §§ 4412(a) and 4413(a), and prohibits certain activities by the Endowment, 22 U.S.C. §§ 4413(b) and 4414(a). In our view, the import of these provisions is clear and we will not disregard the statutory language to arrive at an alternative interpretation that avoids the constitutional issue presented by the Endowment. In this regard, we presume the constitutionality of all federal laws until the courts say otherwise. E.g., B-215863, July 26, 1984.

I hope these views are helpful. If you have any further questions regarding this matter, please contact Mr. Douglas H. Hilton of my staff at (202) 512-5644.

Sincerely yours,

James F. Hinchman
General Counsel